International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 70 (Nielsen Freight Lines) *and* Jack Clausen. Case 32–CB–369

October 26, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On May 28, 1982, Administrative Law Judge Timothy D. Nelson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, International Brotherhood of Teamsters Chauffeurs, Warehousemen & Helpers of America, Local 70, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge: This is a proceeding to determine the appropriate amount, if any, of backpay due to Jack Clausen, an individual, by International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 70 (herein called Respondent), to remedy Respondent's violation of Section 8(b)(2) of the Act in refusing to dispatch Clausen from its Oakland hiring hall because Clausen was not a member of Respondent. It was established in a civil comtempt proceeding in the United States Court of Appeals for the Ninth Circuit that Respondent so violated the Act. Because one of the issues in this case is whether or not Respondent is estopped by the order and judgment in that Ninth Circuit proceeding from raising a certain defense to backpay herein,[1] I set forth below in some detail the legal background to the instant proceeding.

Prior to the institution of civil contempt proceedings against Respondent, Respondent had been ordered by the Ninth Circuit in two proceedings, *inter alia*, to cease and desist from: "Refusing to refer . . . any applicant for employment to employers within its territorial jurisdiction because of nonmembership in [Respondent], or any other union . . . ."[2]

On April 6, 1979, the Board, through its Assistant General Counsel for Contempt Litigation, filed with the Ninth Circuit a Petition for Adjudication in Civil Contempt and For Other Civil Relief (herein called the petition) against Respondent. The Petition contained the following central allegations, which Respondent eventually admitted:

> (1) As a matter of custom and practice, the Union maintains three separate "A" lists depending upon the nature of the work being requested: docks, drivers, and longhaul.
>
> (2) At all material times, Jack Clausen had met all eligibility requirements for at least the docks and drivers lists.
>
> (3) Notwithstanding his eligibility, on or about September 25, 1978, and on various dates thereafter prior to February 22, 1979, the Union informed Clausen that he would not be dispatched through the Union hall to a job with Nielsen Freight Lines or other employers because he was a member of Local 70.

[1] Counsel for the General Counsel contends in her cross-exceptions that the Administrative Law Judge improperly denied the General Counsel's motion to preclude Respondent, on the basis of *res judicata* principles, from raising, as a potential defense, Charging Party Clausen's purported lack of eligibility for a "by-name" dispatch to Nielsen Freight Lines. The General Counsel asserts that the issue of Clausen's actual eligibility for such a dispatch has been determined with finality by the underlying civil contempt proceeding against Respondent in the United States Court of Appeals for the Ninth Circuit. Insofar as Respondent may seek to litigate for backpay purposes the fact that Respondent *would have dispatched* Clausen to Nielsen Freight Lines, it is evident that such a defense is barred by *res judicata* principles, and the Administrative Law Judge properly so found. Thus, the court specifically found in the contempt proceeding that Respondent "failed and refused . . . . to dispatch [Clausen] for work through the hiring hall." However, inasmuch as the contempt proceeding establishes that the actual motivating basis for Respondent's refusal to dispatch Clausen to Nielsen was because of Clausen's nonmembership in Respondent, the issue of Clausen's actual *eligibility* for a "by-name" dispatch was immaterial to that proceeding and was, therefore, neither raised nor apparently considered. Accordingly, the issue of Clausen's actual *eligibility* for a "by-name" dispatch is not *res judicata* and evidence pertaining to that question is properly admissible to whatever extent it may be relevant and material to compliance issues, such as, for example, whether Nielsen Freight Lines would have retained Clausen *subsequent* to his dispatch because of eligibility reasons. Accordingly, we affirm the Administrative Law Judge's findings in this and all other respects.

[1] The General Counsel filed pretrial motions, including one which sought, in effect, partial summary judgment on the ground that one of Respondent's defenses was barred by *res judicata* principles. That motion has been deferred for ruling to this decision and it is denied for the reasons set forth *infra*.

[2] Judgments of the Ninth Circuit on February 10, 1972 (No. 71-2716), and on September 11, 1978 (No. 77-3242). The record herein does not contain citation to the Board proceedings against Respondent which presumably preceded the entry of each of these judgments.

(4) On or about February 22, 1979, Clausen nevertheless returned to the Union hiring hall and attempted to obtain placement on the docks and drivers lists. He was advised by the Union, consistent with past statements, that he would not be placed on such lists because of his lack of membership in the Union.

(5) Despite his availability for work, the Union at all material times has continued to fail and refuse to place Clausen on any of the "A" lists or to dispatch him for work through the hiring hall because of his nonmembership in Local 70.

Accepting Respondent's admissions[3] and other undisputed matters of record herein, the facts underlying the averrals in the petition just summarized included the following: Clausen, although not a member of Respondent, was eligible and qualified by virtue of his experience for placement on an "A" list used by Respondent for dispatching jobseekers to dock and driving (other than longhauls) work with trucking industry employers, including Nielsen Freight Lines, Inc. Clausen had prearranged with a Nielsen agent for that agent to call Respondent's hiring hall and to ask for Clausen "by name." Such a call was placed by a Nielsen agent on September 25, 1978, and Respondent's dispatcher prepared a dispatch slip containing Clausen's name. When Clausen appeared at Respondent's dispatch office to obtain the dispatch slip, Respondent's dispatcher asked him whether he was a member of Respondent, and when Clausen said that he was not, the dispatcher refused to issue Clausen the dispatch slip, writing the words "No book" on the slip and returning the completed slip to Respondent's record files.

Respondent represents that it was the discovery of the facts just set forth which caused it to amend its answer to the Board's petition to admit the averrals set forth above, thereby leaving in issue only certain particulars of the purgation order proposed by the Board.[4]

The petition was referred to a Special Master who set the matter for hearing after prehearing discovery had been concluded. At the hearing, Respondent amended its answer to admit the key allegations of fact contained in the petition set forth above. Thereafter, the Special Master issued his report and recommendations to the court which, *inter alia*, contained the following findings and conclusions:

II. FINDINGS OF FACT

(1) Respondent (Local 70) at all material times herein, has maintained a collective bargaining agreement with various employers in the trucking industry in the Oakland, California area, including one with Nielsen Freight Lines. Article 40, Section 3 of said agreement provides, in part:

(a) The Local Hiring Hall shall maintain a list of all workmen seeking jobs who have been employed on the type of work and in the geographical area covered by the Local Hiring Hall for a period of at least one (1) year, which list shall hereinafter be called "List A." The Local Hiring Hall shall maintain a separate list of all workmen seeking jobs who do not meet that requirement, which list shall hereinafter be called "List B."

(b) Workmen's names shall be entered on said lists in the order in which they notify the Local Hiring Hall of their availability for jobs.

(c) After each workman's name shall be entered a designation corresponding to the type or types of work which the workman is qualified to perform . . . .

(d) In dispatching workmen, preference shall be given to workmen on List A. Within each list, preference shall be given to those whose designations correspond to the type of work involved, in the order in which their names appear on the list. If there are not sufficient workmen on List A, whose designations correspond to the type of work involved, preference shall be given to other workmen on said list in the order in which their names appear, and the same procedure shall be followed with List B should the names on List A be exhausted . . . .

(2) Local 70, at all material times herein, has operated at its Oakland, California office its hiring hall through which it (exclusively) refers workers pursuant to said collective bargaining agreement; in practice, Local 70 maintains six separate "A" lists, depending on the nature of the work requested, and one "B" list.

(3) Said respondent, through its authorized agents, on September 25, 1978, ignored the request of Nielsen Freight Lines and refused to dispatch Jack Clausen (a qualified and eligible applicant for the "A" list) to job with said prospective employer because he was not a member of Local 70.

(4) Thereafter on or about September 26, 1978 and once during October 1978, Clausen, as part of a continuing effort, sought to obtain such referral to Nielsen through said hiring hall but was refused because of his lack of membership in Local 70.

(5) Clausen, on or about February 22, 1979, returned to the hiring hall and sought listings upon the "A" list but was advised by the Respondent's representative that such listing would not be made because of his lack of membership in Local 70.

(6) Respondent Local 70, at all material times herein, has failed and refused to place Clausen, eligible and available, on any of the "A" lists or to dispatch him for work through the hiring hall because of his nonmembership in Local 70.

[3] Specifically, see Respondent's factual references made in a prehearing pleading (G.C. Exh. 1(f), pp. 2-3). Apparently, the facts adverted to by Respondent in those passages and which are set forth below in the main text were matters of record in the contempt proceedings.

[4] *Id.* at 3.

(7) Said respondent, throughout its relationship with and practice toward Clausen, and contrary to the provisions of the collective bargaining agreement, has reserved and restricted the "A" lists to its own members.

(NOTE:) Reference is made to Transcript, page 20, lines 9–14, wherein the Special Master interpreted the ambiguous wording of Paragraph V (Petition) and ruled that the charging allegations related specifically to Clausen: In the recommended finding (7) S/M has considered all of the evidence, including Petitioner's Exhibits Nos. 2–3–4 (signs) and, consistently with said ruling, restricts the finding to discriminatory acts against Clausen.

III. CONCLUSIONS OF LAW

(A) The pertinent judgments of this Court entered under date of February 10, 1972 and September 11, 1978 have been in full force and effect since their entry and, at all material times herein, Respondent Local 70 has had notice and knowledge of the terms thereof.

(B) Said respondent has violated the said Court judgments by arbitrarily and improperly denying employment opportunities to Jack Clausen because of his lack of membership in Local 70; specifically, by refusing to dispatch Clausen to a job with Nielsen Freight Lines on September 25, 1978; on September 26, 1978, and once during October 1978; further, on February 22, 1979, by refusing to place his name on the "A" list for job referrals.

By such pattern of discriminatory conduct toward Clausen, Respondent Local 70 is, and continues to be, in civil contempt of this Court's said judgments.

On May 30, 1980, the Ninth Circuit entered an order affirming the Special Master's report, finding Respondent to be in civil contempt, and further ordering that Respondent purge itself of contempt, *inter alia*, by:

> Making Clausen whole for any loss of wages he may have suffered by reason of the Union's discrimination against him, said amounts, unless agreed upon, to be computed by the Board in a supplemental proceeding, subject to review by this court . . . .

Thereafter, controversy having arisen over the amounts, if any, to which Clausen was entitled pursuant to the above-quoted Order, the Regional Director for Region 32 issued a backpay specification and notice of hearing (specification) on June 22, 1981. Respondent duly answered. I heard the matter in Oakland, California, on March 23, 1982. All parties appeared and were given full opportunity to litigate the issues raised by the pleadings. The General Counsel and Respondent filed posthearing briefs which I have carefully considered.

Principal Questions

The specification, as amended, alleges, and the answer denies, that an appropriate measure of the backpay to which Clausen is entitled is the earnings during the backpay period[5] received by Wilbur Cary, an employee who was dispatched to Nielsen Freight Lines by Respondent not long after the September 25, 1978, date when Respondent wrongfully refused to dispatch Clausen to that employer, and who remained in Nielsen's employ through the balance of the backpay period. It is therefore apparent the specification was drafted on the assumption that Clausen would have been dispatched to Nielsen on September 25, 1978, but for Respondent's discrimination, and that, like Wilbur Cary, once dispatched, Clausen would have worked regularly there through the balance of the backpay period.

Respondent's answer challenged the foregoing set of assumptions on two alternative grounds: First, that "Clausen was not eligible under the . . . provisions of the applicable collective bargaining agreement for dispatch or employment by Nielsen Freight Lines." As amplified by undisputed evidence, Respondent here relied on the fact that the applicable labor agreement expressly limits the right of employers to make "by name" requests to persons on the Union's register who had worked for that employer "during the last six months." Since Clausen had never previously worked for Nielsen, Respondent argues that Clausen was not entitled to be dispatched "by name" to Nielsen on September 25, 1978, and, therefore, that it would be improper to award him backpay for Respondent's failure to dispatch him to a job which he was never contractually eligible to take in the first instance.

Alternatively, Respondent argues that the specification wrongly focused on the earnings during the backpay period of Wilbur Cary as the measure of the earnings which Clausen would have received had he been dispatched to Nielsen. Here, Respondent contends, in substance, that the selection of Cary was arbitrary and that other persons dispatched to Nielsen about the same time that Cary, worked there only briefly. Respondent therefore argues that Clausen probably would have worked there only briefly even if Respondent had dispatched him.

Analysis and Concluding Findings

A. *Res Judicata Issue*

In substance, the General Counsel views Respondent's defense to backpay based on Clausen's ineligibility for a "by name" dispatch as an attempt to relitigate in this forum a question which was or should have been adjudicated in the civil contempt forum. More specifically, from the General Counsel's brief,[6] it appears that the

[5] Alleged in the specification to have commenced on September 25, 1978, when Respondent refused to dispatch Clausen to Nielsen Freight because Clausen was not a member of Respondent and to have ended on August 25, 1979, i.e., roughly a week after Respondent formally notified Clausen that he would be permitted to register at, and be dispatched through, Respondent's hring hall, without regard to his lack of membership in Respondent. Respondent concedes that the backpay period is appropriate (Resp. br., p. 4, fn. 3).

[6] G.C. br., pp. 3–4

General Counsel interprets this defense as somehow amounting to an attempt by Respondent to relitigate the question of its actual motive on September 25, 1978, in refusing to dispatch Clausen to Nielsen. If the General Counsel's interpretation of Respondent's position were correct, then I would have no diffulty in concluding that the question of Respondent's actual motive was, in fact, adjudicated in the civil contempt proceeding, and cannot be relitigated herein. Moreover, Respondent has expressly conceded that "The Union's refusal to respond to Clausen's effort to find employment was motivated solely by his nonmembership in Local 70."[7] And Respondent's acknowledgment of this is integral to its argument that the only question raised in the civil contempt forum was whether or not Respondent was improperly motivated in refusing to dispatch Clausen to Nielsen or otherwise to permit him to register and be dispatched to trucking industry employers.

In essential agreement with Respondent this far, I conclude that the General Counsel has simply misconstrued Respondent's position in this forum and/or has misconstrued the nature of the underlying contempt proceeding. I also reject the General Counsel's related argument that because Clausen's "eligibility" for referral was touched on in the civil contempt forum, all potential questions pertaining to Clausen's "eligibility" were necessarily determined in that forum.[8] This misconstrues the nature of the "eligibility" findings in the underlying proceeding. The petition alleged and Respondent's answer admitted merely that Clausen had ". . . met all eligibility requirements for at least the docks and drivers *lists*" (petition, par. 2, emphasis supplied); and that "Despite his availability for work, the Union . . . has continued to fail and refuse to place Clausen on any of the "A" lists or to dispatch him for work . . . because of his nonmembership . . . " (petition, par. 5). There is no evidence that the question of Clausen's eligibility for an out-of-order (i.e., "by name") dispatch to Nielsen was ever raised. It is thus evident that the Special Master in reaching his above-quoted finding of fact number 6 that Clausen was "eligible and available" was simply referring to Clausen's "eligibility" for placement on the "A" list(s) in the hiring hall. And, specially where Respondent admitted in the contempt forum that it was wrongly motivated in refusing to dispatch Clausen to Nielsen or otherwise to register and refer him during the backpay period, it was simply unnecessary to determine, for purposes of finding a violation of the prior court orders, whether Clausen was contractually eligible for a "by name" dispatch to Nielsen.[9]

[7] Resp. br., 13.

[8] Here, the General Counsel relies on the Special Master's general finding of fact number 6 that, although Clausen was "eligible and available," Respondent had failed to place Clausen on the "A" lists or to dispatch him because of his nonmembership in Respondent.

[9] Similarly, it would not be necessary at the unfair labor practice stage of a Board proceeding to determine with specificity which jobs, *if any*, a hiring hall job applicant would have been sent to if it had not been for a wrongfully motivated refusal to allow him to use the services of the union's hiring hall. See, e.g., *Pipeline Local Union No. 38, etc. (Hancock-Northwest, J.V.)*, 247 NLRB 1250, 1251 (1980). However, where such questions were, in fact, litigated and adjudicated in such underlying proceeding, the doctrine of *res judicata* bars their relitigation in the backpay proceeding. *Brown and Root, Inc.*, 132 NLRB 846, 492–493 (1961).

B. *The Significance for Backpay Purposes of Clausen's Contractual Ineligibility For By-Name Dispatch to Nielsen Freight*

It is undisputed that article 40, section 3(e), of the applicable labor agreement purports to restrict the right of an employer to request a specific employee by name from the hiring hall to cases of employees who have previously worked for the employer within the past 6 months. It is likewise undisputed that Clausen had never worked previously for Nielsen and, therefore, that the labor agreement could have privileged Respondent in refusing to honor Nielsen's September 25, 1978, request for Clausen on this ground. It is equally undisputed, however, that Respondent was not, in fact, motivated by "Article 40" considerations in denying Clausen the dispatch to Nielsen. Rather, as Respondent implicitly concedes and which is *res judicata* in any case, Respondent would have dispatched Clausen to Nielsen *but for* Clausen's admission that he was not a member of Respondent.[10]

The facts of record herein uncontradictedly show that not only would Clausen have made it onto Nielsen's payroll had it not been for Respondent's September 25, 1978, discrimination, but also that he would have remained so employed thereafter, for as long as Nielsen chose to employ him. Thus, Respondent's Business Representative Marty Frates admitted that Respondent has no internal mechanism for policing compliance with article 40, section 3(e). As Frates further explained, the dispatcher will not independently investigate whether a hiring hall registrant called for "by name" meets the prior employment requirements of that article. Rather, the dispatcher will routinely honor such a request. Frates' testimony further leaves grounds for doubt whether there is any substantial history of enforcement by Respondent of article 40, section 3(e). While Frates vaguely testified to the pendency of a current grievance over an alleged violation of the rule, what emerged rather clearly from his testimony is that enforcement of the rule is, at best, haphazard, and is triggered (in the only case which Frates knew about) by some complaint from an employee working for the employer who allegedly abused the rule. What is most significant about Frates' testimony, for present purposes, is his concession that, even when an employer has been detected in an abuse of the "by name" dispatch requirements, Respondent would not call for the discharge of the employee thus dispatched, but, rather, would simply demand that the employer pay a penalty premium amounting to a day's pay for the hiring hall registrant who would have received the dispatch according to normal rotational principles. Note, moreover, Frates' concession that he was merely speculating about what

[10] Thus, it was found in the civil contempt forum that Respondent not only failed, throughout the backpay period, to allow Clausen to *use* the hiring hall due to his nonmembership, but it was also expressly found that Respondent "refused to dispatch" Clausen on September 25, 1978, to a job with Nielsen for the same reason. Had only the former type of violation been adjudicated in the contempt case, it might now be open to Respondent to contend and to furnish proof that its dispatcher would have refused in any case to send Clausen and Nielsen based on valid "Article 40" considerations.

Respondent would do, since there was no prior pattern of article 40 enforcement so far as Frates was aware.[11]

It is not unusual for employers or unions found guilty of 8(a)(3) or 8(b)(2) "discharge" violations to argue at the compliance stage that the discriminatee's backpay should be deemed tolled as of a certain point because he would have been terminated (or otherwise disqualified to work) in any case for nondiscriminatory reasons. But the Respondent making such a contention bears the burden of establishing by a preponderance of the evidence that such a backpay-tolling event would have occurred (and, if so, *when* it would have occurred). *John H. Canova d/b/a Canova Moving & Storage Co.*, 261 NLRB 639, fn. 4 (1982). Doubts are to be resolved in favor of the backpay claimant and against the respondent whose wrongdoing created the basis for doubt as to what would have happened absent the unlawful conduct. E.g., *Fibreboard Paper Products Corporation*, 180 NLRB 142, 143 (1969), and cases cited. See also *Local Union No. 13, an affiliate of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Mechanical Contractors Association of Rochester, Inc.)*, 226 NLRB 583 (1976).

Here, there is no record evidence—let alone a preponderance—which would justify the conclusion that Clausen would have eventually lost his job with Nielsen on "Article 40" grounds. To the contrary, the record preponderantly supports the conclusion that Clausen would have remained in Nielsen's employ for as long as Nielsen wanted him, absent Respondent's refusal to dispatch him on nonmembership grounds.

Although Respondent does not express it in precisely this way, I construe its contention that Clausen was "disqualified" from backpay derived from putative Nielsen earnings as, essentially, a "policy" argument. For, as noted above, it is evident that Clausen would have worked for *some* length of time for Nielsen had it not been for Respondent's discrimination; and, *a fortiori*, Clausen thereby suffered *some* "loss of wages" *from Nielsen* "by reason of the Union's discrimination against him" within the meaning of the circuit court's purgation order.

Accordingly, unless, as a matter of policy, the Board should not award backpay linked to Clausen's putative employment with an employer who was not contractually entitled to ask Respondent to dispatch him, it is evident that the drafter of the specification was on firm ground in focussing on Clausen's potential earnings from Nielsen as the measure of Clausen's backpay entitlement.

Treating Respondent's position as to Clausen's "disqualification" for Nielsen employment as an appeal to "policy" yields no different result. It is not evident what public policy would be served by denying to Clausen backpay based on whatever earnings he would have received from Nielsen simply because there existed some contractual language which Respondent could have, but did not, invoked at the time it refused to dispatch him to Nielsen for unlawful reasons—especially under circumstances where, in fact, the contract provision in question is "enforced," if at all, by measures which do not result in the discharge of the employee who was not entitled to the "by name" dispatch. In this regard, such a case must be distinguished from *N.L.R.B.* v. *U.S. Truck Company*, 124 F.2d 887 (6th Cir. 1942), in which the court of appeals refused to enforce the Board's reinstatement and backpay award to two employees who were guilty of violating I.C.C. regulations and the Motor Carrier Act, which the court characterized as "a federal statute of equal force with the National Labor Relations Act." In so doing, the court invoked substantial public policy interests which would be undermined if the Board's remedial order were to require an employer to "violate other statutes highly important to the public safety." *Id.* at 890.[12]

Accordingly, there being neither factual nor compelling policy reasons why Clausen should not be recompensed for earnings lost when Respondent refused for unlawful reasons to refer him to Nielsen Freight Lines, I conclude that Respondent's defense in this regard must be rejected.

C. *The Selection of Wilbur Cary's Earnings as the Measure of What Clausen Would Have Earned at Nielsen Freight Lines*

As noted earlier, Respondent alternatively objects to the General Counsel's selection of the earnings of one Wilbur Cary at Nielsen as the best measure of what Clausen would have earned but for Respondent's wrongful refusal to dispatch him on September 25, 1978. Respondent's objection relies on two sets of undisputed facts. First, from a sampling of 15 employees dispatched by Respondent to Nielsen in the week following the denial to Clausen of a dispatch, the Board's compliance officer admittedly discarded from further consideration the earnings of all but the three employees who eventually obtained "seniority" with Nielsen.[13] Correctly noting that the large majority of workers thus dispatched during the sampling period did not work regularly at Nielsen thereafter, Respondent argues that it was arbitrary and prejudicial to focus on the earnings of the three workers (including Cary), who did acquire seniority.[14] Instead, Respondent argues that the earnings of all 15 employees dispatched to Nielsen should be "averaged" to compute Clausen's proper backpay entitlement.

In support of these related positions, Respondent argues that it would have been more "accurate" to presume that Clausen would not have obtained seniority with Nielsen. Here, Respondent stresses that, unlike the three employees who were focussed upon by the compliance officer, Clausen had not previously worked for Nielsen, was therefore unknown to Nielsen, and thus

[11] Frates has held his current position with Respondent for 4 years.

[12] See also *Local 57, International Union of Operating Engineers (M. A. Gammino Construction Co.)*, 108 NLRB 1225, 1227 (1954), distinguishing *U.S. Truck, supra.*

[13] Under the labor agreement, "seniority" is acquired, with attendant job retention, recall, and other rights, if an employee works for more than 20 days for the same employer in a 60 consecutive day period. By contrast, non-"seniority" ("casual") employees may be terminated or denied recall by an employer without recourse, under the labor agreement.

[14] Cary's hours of work and earnings were ultimately selected as the yardstick for calculating Clausen's backpay because Cary's hours and earnings fell between those of the other two employees who acquired seniority.

would not have had the kind of inside track to acquisition of seniority that the three, including Cary, did.

Respondent's arguments on these points are not frivolous, but there is greater substance to the arguments favoring the General Counsel's selection of Cary from among the group of three employees who acquired seniority. Thus, Clausen testified uncontradictedly, and I find, that he had personnally interviewed with a Nielsen agent before being called for "by name" on September 25 and that he and the Nielsen agent had prearranged for Clausen to be on hand at the hiring hall to accept the "by name" dispatch. This strongly suggests that Clausen had already undergone a form of prescreening by Nielsen which would make it more likely that he would be found acceptable than if he had been merely dispatched to Nielsen on a random basis. For this reason alone, there is a factual basis for distinguishing Clausen from the group of persons who had never previously worked for Nielsen, i.e., the group which Respondent focusses on as being more comparable to Clausen. Moreover, to presume that Clausen would not have been found sufficiently acceptable by Nielsen to acquire seniority would, on this record, give undue emphasis to Respondent's highly speculative predictions, themselves based on equivocal statistical evidence, and without any showing whatsoever that Clausen was a substandard worker.

It is well established, as noted above, that doubts must be resolved against the party whose wrongdoing makes certainty impossible. It is equally established that the General Counsel's choice of a formula for computing backpay need not (and, normally, could not) reach an exactly "correct" result. *N.L.R.B.* v. *Rice Lake Creamery Co.*, 365 F.2d 888 (D.C. Cir. 1966); *N.L.R.B.* v. *Brown & Root, Inc.*, 311 F.2d 447, 452–453 (8th Cir. 1963).

Resolving uncertainties in Clausen's favor, I conclude that the General Counsel was warranted in presuming, for remedial purposes, that Clausen would have acquired seniority at Nielsen and thus would have enjoyed regular earnings there throughout the backpay period. It was, moreover, reasonable for these purposes to select the earnings of the Nielsen employee whose hours and earnings were between those of the order two "seniority" dispatchees; i.e., those of Wilbur Cary.

I therefore sustain the backpay specification, as amended, in its entirety[15] and make the following recommended:

SUPPLEMENTAL ORDER[16]

The Respondent, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 70, its officers, agents, and representatives, shall:

1. Pay to Jack Clausen the following total sum, together with interest, following formulas established in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977):

Backpay	$10,262
Reimbursement for medical expenses and health insurance coverage	488
Total	$10,750

2. Pay to the appropriate pension trust for credit to Jack Clausen's account the amount of $1,596.

[15] Respondent raised at the hearing, but has not abandoned, a challenged to the appropriateness of that portion of the specification which calls for contributions to be made to a pension trust on Clausen's behalf. All other aspects of the specification, as amended, are admitted by Respondent to be accurate and appropriate.

[16] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.